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(19)

No. 98-208

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE

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Pursuant to Rules 21 and 37.3 of the Rules of the Supreme Court of the United States, The Rutherford Institute hereby respectfully moves the Honorable Court for leave to file out of time the brief *amicus curiae* of The Rutherford Institute in the above-captioned matter, which was submitted to the Court on January 21, 1999.

1. The Rutherford Institute is an international, non-

profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in numerous cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court, including recent gender discrimination cases *Burlington Industries, Inc. v. Ellerth*, Sup.Ct. No. 97-569 (October Term 1997) and *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred and ninety cases nationally in various trial and appellate courts, including numerous employment discrimination actions brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* The Institute has published educational materials and taught continuing legal education classes in this area as well.

2. On January 21, 1999, pursuant to Rule 37.3 of the Rules of the Supreme Court, counsel for The Rutherford Institute submitted to the Clerk of the Supreme Court a brief *amicus curiae* in support of neither the Petitioner nor the Respondent in this action, but suggesting reversal. Insofar as the consent of the counsel for both parties could not be secured,[1] movant filed therewith a Motion for Leave to File Brief *Amicus Curiae*. Service of the Motion for Leave to File

[1] The consent of counsel for the Respondents was obtained. The consent of counsel for the Petitioners was requested and refused.

Brief *Amicus Curiae* and the Brief *Amicus Curiae* of The Rutherford Institute was made on counsel for both parties and proof of service submitted therewith pursuant to Rules 37.5 and 29 of the Court.

3. The Motion for Leave to File Brief *Amicus Curiae* and the Brief *Amicus Curiae* of The Rutherford Institute were submitted to the Court out of time, insofar as Rule 37.3(a) clearly states that an *amicus curiae* brief in a case in which review has been accepted "shall be submitted within the time allowed for filing the brief for the party supported, *or if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief.*" (Emphasis supplied.)

4. Counsel of Record's error was completely inadvertent and unintentional, and arose from counsel's incorrect reading of Rule 37 of the Rules of the Supreme Court. In calendaring the due date, counsel improperly referred to Rule 37.2, which relates to *amicus* briefs filed for petitions for writ of *certiorari* and permits the filing of a brief on behalf of neither party "within the time allowed for filing a brief in opposition." The error was entirely Counsel of Record's, and counsel sincerely regrets the error.

5. Counsel was contacted by telephone on January 27, 1999, by a clerk in the Documents Control Division of the Court, who pointed out the error. Upon being apprised of the error, counsel acted as expeditiously as possible to ascertain how the mistake occurred and to draft and file this Motion.

6. In view of the circumstances as stated above, and in consideration of the nature of Movant's brief as an *amicus* brief of an independent officer of the Court submitted on behalf of neither party, Movant respectfully requests the Court's

forbearance in this matter and asks that an order be issued permitting Movant to file its brief out of time as of the date on which the Court may grant this Motion.

Respectfully submitted,

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